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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

STATE OF CALIFORNIA,
STATE LANDS COMMISSION,
Petitioners,

v.

DEEP SEA RESEARCH, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

I. A STATE'S ELEVENTH AMENDMENT IMMUNITY DOES NOT TURN ON WHETHER THE STATE "POSSESSES" THE PROPERTY ON STATE SUBMERGED LANDS THAT IS THE SUBJECT OF THE DISTRICT COURT ACTION

The orders of the district court below go to the heart of the State sovereignty that the Eleventh Amendment exists to protect. The *Brother Jonathan*, which the State of California claims to own, rests on the State's sovereign submerged lands.[1] Further, regardless of ownership, the State has a

1. "Ownership of submerged lands—which carries with it the power to control navigation, fishing, and other public uses of water—is an essential attribute of sovereignty." *United States* v. *Alaska*, __U.S.__, 117 S.Ct. 1888, 1892 (1997), quoting *Utah Div. of State Lands* v. *United*

strong interest in protecting and preserving historic shipwrecks that lie on State sovereign lands. The district court nonetheless refused to honor the State's assertion of Eleventh Amendment immunity, thus leaving the State's ownership claim for resolution in a federal district court at the behest of a private party. Further, the district court's injunction prevents "competing" salvors acting with State authorization from examining or, if permitted, recovering the wreck and its artifacts. Pet.App. A62–A63. Finally, the court enjoined others from "interfering" with DSR's salvage efforts. *Id.*[2] These district

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States, 482 U.S. 193, 195 (1987). Deep Sea Research ("DSR") incorrectly suggests that offshore submerged lands, to which the States gained title under the Submerged Lands Act, 43 U.S.C. §§ 1301–1315 ("SLA"), are not sovereign in character. Brief for Respondent 34. There is no basis for relegating such offshore submerged lands to second-class status in relation to submerged lands landward of the coastal low-water mark and beneath inland navigable waters, which the later-admitted States received under the Equal Footing doctrine. The submerged lands obtained under the Equal Footing doctrine lie immediately adjacent to the submerged lands granted by the SLA and are equally vital to the welfare of a State and its citizens. In *United States* v. *Alaska*, *supra*, this Court refused to apply a "less demanding standard" in assessing whether offshore submerged lands had been reserved by the federal government prior to statehood. 117 S.Ct. at 1906–07.

2. DSR claims that, at least since the June 1996 amendment of the district court's injunction to allow "persons employed in law enforcement or other emergency services" to enter the "safety zone," California was not prohibited from regulating the salvage of the *Brother Jonathan*. Brief for Respondent 14, n.7. The June 7, 1996 amendment added new paragraphs 6 and 7. Paragraph 6 expands the prohibition on interference with DSR's salvage of the *Brother Jonathan* contained in paragraph 3 of the original injunction (Pet.App. A63) to bar *all* persons from a geographical "Safety Zone" for a four-month period, after which the injunction reverts to the language of the original order. New paragraph 7 contains only a limited exemption from the prohibition of paragraph 6:

> "7. The restriction outlined in Paragraph 6 shall not apply to: (1) persons employed by or under contract with DSR whom DSR deems necessary to the conduct of its salvage operations; (2) persons or entities expressly approved by Order of court; and (3) persons employed in law enforcement or other emergency management, such as firefighting, emergency medical services, or other similar public emergency services, provided that such persons are at the time of the intrusion in the area, in public employment at the local, county, state, or federal level, and the intrusion is authorized and necessary for the fulfillment of their duties." Order re: DSR's Request to Amend Injunction, filed June 7, 1996, District Court Docket No. 115.

That an exemption was necessary for emergency and law enforcement services within the exclusion zone demonstrates just how all-encompassing the injunction really is. The State Lands Commission and the California Coastal Commission, under whose regulation such salvage would normally fall, are neither "law enforcement" nor "emergency medical" agencies.

court incursions into State sovereignty are the very thing that the Eleventh Amendment was adopted to prevent.

Both Deep Sea Research ("DSR") and the United States nonetheless argue that this result is entirely consistent with the Eleventh Amendment jurisprudence of this Court. Why? Because the Eleventh Amendment affords the States protection against district court judgments *in rem* sought by private parties only if the State has actual possession of the property in question. The State must prove actual possession of the property, the argument runs, and if it cannot show actual possession, then the Eleventh Amendment has absolutely no application; the State must then submit to the jurisdiction of the district court and must prove its claim by a preponderance of the evidence. Brief for United States 15, 30–32. Not surprisingly, no decision of this Court is cited for this startling proposition. Accordingly, the supporting argument is a roundabout one, proceeding through a discussion of various admiralty cases that is often inaccurate or imprecise in its characterization of facts and holdings. Further, the argument is made against the backdrop of an absolutely unfounded assumption: that California is here arguing that its assertion of an interest in the property necessarily requires dismissal of the whole action, and not merely dismissal of the State from that action—a result that would completely foreclose the exercise of district court jurisdiction, even regarding claims of the

United States and private parties. After again stating the limited goal of the State here, we will discuss the principal cases that together are said to suggest that the State must have actual possession of the *Brother Jonathan* for the Eleventh Amendment to be honored.

A. California Seeks Only Its Dismissal From the Lawsuit, Not Dismissal of the Lawsuit Itself

Taken alone, a State's assertion of Eleventh Amendment immunity does not dictate what the district court's related response must be in terms of the continued pendency of the action itself. That latter decision is governed by considerations of whether the action should, as a practical matter, proceed without the presence of the State. This independent question of whether an absent party is "indispensable" so that a lawsuit ought to be dismissed in the absence of that party can only be determined in the context of that particular litigation. *Provident Bank* v. *Patterson*, 390 U.S. 102, 118 (1968). Whether all or only a portion of the action is dismissed after a court has determined to respect a State's assertion of Eleventh Amendment immunity may involve the court in consideration of various alternative procedural courses of action, ranging from dismissal of the entire action, to allowing the action to proceed "*in rem*" against all the world less the State, to allowing it to proceed *in personam* against other claimants who may then be before the court. *Compare Florida Dept. of State* v. *Treasure Salvors, Inc.*, 689 F.2d 1254, 1256 (5th Cir. 1982), *and Zych* v. *Wrecked Vessel Believed to be the Lady Elgin*, 960 F.2d 665 (7th Cir. 1992) (actions dismissed only against State, and allowed to proceed regarding remaining parties) *with Maritime Underwater Surveys, Inc.* v. *The Unidentified, Wrecked and Abandoned Sailing Vessel*, 717 F.2d 6, 7, 8 (1st Cir. 1983) (State sole competing claimant; whole action dismissed).

At the time that California's motion to dismiss was filed, and even months later when it was denied, the State was the

sole person or entity that had asserted a claim. It was not until later, after the State had appealed, that the federal government, the only other claimant, asserted a claim to a portion of the cargo. Accordingly, the State's motion for dismissal of the action was in keeping with the then existing circumstance that it was the only party asserting a claim to the shipwreck and its cargo other than DSR. The later decision of the United States to file a claim altered the situation, as would the filing of a claim by any other additional parties. In such changed circumstances, with such additional parties having joined the action, the better course would doubtless be to dismiss the State alone, as distinct from the action as a whole. The State is entirely comfortable with such a result. That would leave the State and DSR to resolve their competing claims to the *Brother Jonathan* and her cargo in State court.

B. The Cited Cases From Other Contexts Do Not Support the Restrictive Interpretation of the Eleventh Amendment Argued for by DSR and the United States

1. DSR and the United States seem to place principal reliance upon an 1809 decision of this Court, *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809). The brief of the United States contains the following statement:

> "[T]his Court has sustained the adjudication of the interests of a State in an *in rem* action when the State was not in possession of the property, see *United States* v. *Peters*, 9 U.S. (5 Cranch) 115 (1809)." Brief for United States 14.

Peters was not an *in rem* action, and the State's possession, or lack of it, did not figure in the Court's decision. Accordingly, the case provides no support for the "possession" argument.

The *Peters* case was one of the last way stations in a particularly tangled history of litigation that began in a State admi-

ralty court in Pennsylvania in 1778. In brief outline, a British vessel, the sloop *Active*, was seized as a prize in September 1778, during the Revolutionary War. There were three sets of claimants, among them the Commonwealth of Pennsylvania, one of whose vessels, the armed brig *Convention*, had participated in the seizure. The *Active* was brought to Philadelphia, and there libelled by the captain of the *Convention* as prize of the *Convention*. Competing claims in addition to those of Pennsylvania were filed in the action. Subsequently, the state admiralty court determined the respective shares of the claimants in the vessel and its cargo, awarding a share to Pennsylvania. One set of claimants, who had been captured by the British and forced into service as seamen on the *Active*, and who had forcibly seized control of the vessel while at sea, appealed to a special court of appeals for prize cases that had been established by the Continental Congress. In December 1778, the appeals court reversed the state admiralty court, concluding that the entirety of the vessel and its cargo should be awarded to the former captive seamen, and that Pennsylvania should take nothing. The appeals court decision became final. That decision was nonetheless disobeyed by the state admiralty judge and marshal, and, in May 1779, a portion of the proceeds of the sale of the vessel was paid to David Rittenhouse, then Treasurer of the Commonwealth. For reasons explained in the opinion of the Court, the proceeds were paid to Rittenhouse and subsequently held by him as his personal property. Upon the death of Rittenhouse, control of the proceeds passed to his executrixes.

In 1802, the former captives that had been adjudged entitled to the proceeds of the *Active* by the appeals court filed a libel on the admiralty side of the federal district court at Philadelphia, seeking to recover from the executrixes the moneys, with interest, that had been wrongfully paid to Rittenhouse. The action was *in personam*, with Gideon Olmstead, Artimus White, and Aquilla Rumsdale as libellants, and the executrixes, Elizabeth Sergeant and Esther Waters, as respondents. *See United States* v. *Peters, supra,* 9 U.S. at 115, 131, 135, 139.

Pennsylvania was not named as a party and did not appear to assert its competing claim to the moneys. In January 1803, the district judge, Richard Peters, ruled for the libellants and ordered payment to them by the respondents of the moneys sought.

Payment not having been made, the libellants, in May 1807, obtained an order to show cause why the decree should not be enforced. The respondent executrixes explained their nonpayment by reference to an 1803 act of the Pennsylvania legislature. The act declared that the 1778 appeals court judgment was void, that Pennsylvania was therefore entitled to the moneys held by the executrixes as its share of the prize, pursuant to the 1778 state admiralty court judgment, and that the attorney general of the Commonwealth should seek payment of the disputed moneys from the executrixes, and, if necessary, file suit against them. The act also stated that, because the claims of the Commonwealth to the disputed moneys were implicated in the *in personam* action pending before Judge Peters, the Eleventh Amendment prohibited the district court from exercising any jurisdiction in the matter whatsoever.[3]

Judge Peters being reluctant in the circumstances to order execution upon his decree, the libellants sought mandamus from this Court directing Judge Peters to order an attachment, or other appropriate process, to enforce his decree. In his return to the alternative writ of mandamus issued at the direction of this Court, Judge Peters explained the "prudential mo-

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3. On this point, the act read as follows:
"[T]he jurisdiction entertained by Richard Peters, judge of the district court . . . was illegally usurped and exercised; that the rights of this commonwealth as a claimant, and as the party substantially interested in the said suit, though apparent on the face of the proceedings, were unfairly passed over and set aside; . . . and that the jurisdiction and decree of said Richard Peters hereon were entertained and made in manifest opposition to, and violation of, the [Eleventh Amendment], and ought not to be supported or obeyed." 9 U.S. at 132.

tives" that led him to withhold the requested process. He made clear, however, that he disagreed with Pennsylvania's claim that the Eleventh Amendment wholly deprived the district courts of jurisdiction in actions *in personam* in which a claimant State was not named as a party but nonetheless had a claim that bore on the subject of the action:

> "It is well known to your honorable court, that third persons claiming interests *in pais* [outside the litigation], cannot, by such claims, constitute themselves, or be judicially considered, parties in suits pending in the names of others." 9 U.S. at 118.

When this adjunct mandamus proceeding, entitled *United States* v. *Peters*, came before the Court for decision, Chief Justice Marshall summarily disposed of Pennsylvania's novel contention that the Eleventh Amendment foreclosed exercise of any jurisdiction by the district court in the *in personam* action pending below, using the language that is quoted by DSR and the United States in their briefs:

> "[I]t certainly can never be alleged, that a mere suggestion of title in a state, to property in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title." 9 U.S. at 139–40.

In the context of the *in personam* action that underlay the writ proceeding in this Court, there is nothing remarkable in this statement. Had the underlying action before Judge Peters been one *in rem* to establish title "against all the world," the statement might have some relevance here, but the action was not *in rem*, contrary to the characterization by DSR and the United States.

2. Two other cases, *Governor of Georgia* v. *Madrazo*, 26 U.S. (1 Pet.) 110 (1828), and *Ex parte Madrazo*, 32 U.S. (7 Pet.) 627 (1833), are cited by the United States in an effort to bolster the *obverse* of its contention: that, when the thing at issue *is* in possession of the State, an *in rem* action will not

lie. Neither case supports the reading proffered by the United States, and thus the suggested inference cannot be drawn.

In *Governor of Georgia* v. *Madrazo*, the Court ruled that the action was not *in rem* because *in rem* process had never been perfected in the district court. Accordingly, the case was disposed of on the ground that, as the suit was *in personam* by a subject of a foreign State against the Governor in his official capacity, and hence was against the State itself, the district court lacked jurisdiction, original jurisdiction residing with the Supreme Court.[4]

Again in *Ex parte Madrazo*, an original proceeding before this Court, the suit was treated as *in personam*, not *in rem*. In a two-sentence opinion, Chief Justice Marshall noted that the suit was not one for the exercise of *in rem* admiralty jurisdiction, there being no property in the custody of a court of admiralty. The Court characterized the action as "a mere personal suit against a state," and concluded that "no private person has a right to commence an original suit in this court against a state." 32 U.S. at 632. There was no indication in the Court's opinion that it thought that an *in rem* action was barred under the principle of sovereign immunity because the contested property was in the possession of the State of Georgia.

3. The discussion in the Brief of the United States regarding the special principles of comity and international law under which the "public vessels" of foreign governments (as distinct from the governments themselves) are accorded immunity from suit also reflects a misunderstanding of the cases cited, and therefore fails to support the argument advanced.

A "public vessel" is one that is owned by, and in the possession of, a friendly government. *Compania Espanola* v.

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4. Because the Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80, conferred original, but not exclusive, jurisdiction upon the Supreme Court in cases involving a suit between a State and a foreign subject, this holding has been characterized as "surprising." *See Welch* v. *Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 492, n.24 (1987).

Navemar, 303 U.S. 68, 74 (1938). Because, in a libel *in rem*, a vessel, and not a sovereign government, is sued, there must be some proof that the vessel itself is different from other vessels, that is, that it is in fact a public vessel, for the immunity to attach. Save for the question, not present in our case, whether an agency is an "arm of the State," there is no similar need to assess whether a State, as a party defendant, is indeed "sovereign," and so entitled to immunity. Further, contrary to the suggestion by the United States in its discussion of these public vessel cases, the type of proof turns not on possession but upon whether the Executive Branch of the United States Government chooses to file a suggestion with the district court that the libelled vessel is indeed a public vessel, as contended by the foreign government. If the United States Government submits such a suggestion, that is conclusive upon the court, and nothing additional need be offered or shown. *Id.*; *The Pesaro*, 255 U.S. 216, 218–19 (1921). If the Government declines the request to file such a suggestion, the foreign government is put to its proof concerning the asserted immunity of the vessel from suit. *Navemar*, *supra*, 303 U.S. at 74–76. Additionally, the suggestion that the degree of proof required turns on possession or non-possession is not supported by the citation to *The Pesaro, supra*. That case said nothing about differing standards of proof premised on possession, but instead went off on the procedural ground that the suggestion there of a foreign ambassador that a vessel was a public vessel was not the equivalent of a suggestion to that effect by the United States Government. In fact, where it is established that an asserted public vessel was not in the possession of a foreign government at the time of the vessel's arrest, that is the *end* of the immunity inquiry, not, as the United States suggests, the point at which a stricter standard of proof is applied. *See Navemar, supra.*

It is apparent that this arcane corner of international law is very dependent on the legal fiction that an inanimate object has "personality" sufficient to make it susceptible to suit. And as the United States concedes, Congress may abrogate

these immunity principles in certain admiralty contexts. Brief of United States 28, n.20. As explained below, neither of these factors applies when it is the sovereign immunity of the States under the Eleventh Amendment that is at issue.

4. Finally, the reference to the federal government's sovereign immunity in cases such as *The Davis*, 77 U.S. (10 Wall.) 15 (1869), has limited application here. *The Davis* did not, as in this case, involve the question of title. There, the question was whether an acknowledged salvage lien could be satisfied by the sale of cotton owned by the United States but not in its possession. This Court held that the law was settled that a salvor may establish a lien against property owned by the United States, just as against any other property. *Id.*, at 19. Concerning satisfaction of the judgment, the Court held the cotton could be sold because the cotton was not in the possession of the United States when seized, but rather in the possession of the master of the vessel. *Id.*, at 21–22. Nothing in *The Davis* indicates that, if title to the cotton were in issue, lack of possession of the cotton by the United States would have been fatal to a claim of sovereign immunity.

Moreover, the case has limited relevance to Eleventh Amendment jurisprudence, again for the reason that this and similar admiralty cases are dependent on the fiction that an *in rem* adjudication of rights in a thing does not constitute a suit against claimants to that thing. The pivotal facts in *The Davis* were that no suit had been filed against the United States as defendant, and that *in rem* process against the vessel and cargo had been effected without the need of service of process upon federal officers in possession of the property that was the subject of the *in rem* proceeding. Accordingly, the Court concluded that the federal government's sovereign immunity had not been violated.

While seizure of property in the physical possession of a State pursuant to district court process would obviously implicate the issue of sovereign immunity from suit and court process, a purported adjudication by a district court of title to property resting on a State's sovereign lands is no less impor-

tant in its impact on core elements of State sovereignty.

Finally, as with the public vessel immunity cases discussed above, Congress is again free, in the context of the federal government's sovereign immunity, to alter that immunity. *See* Brief for United States 29, n.21 (citing acts of Congress permitting *in personam* suits against the United States). Congress of course is not similarly empowered to alter Eleventh Amendment immunity, save in implementing the protections of the Fourteenth Amendment. *See Seminole Tribe of Florida* v. *Florida*, __U.S.__, 116 S.Ct. 1114 (1996).

C. Assessment of Eleventh Amendment Immunity Turns on the Practical Impact of a Suit Upon a State's Sovereignty, Not Upon the Fine Points of Historical Admiralty Practice

Early Eleventh Amendment jurisprudence was freighted with some of the same formalisms that to some extent still exist in the practice of admiralty law. For instance, the view in the early decades of the nineteenth century was that the Eleventh Amendment was "limited to those suits in which a State is a party on the record." *See Osborn* v. *United States Bank*, 22 U.S. (9 Wheat.) 738, 857 (1824). Gradually, however, this Court's cases construing the reach of the Eleventh Amendment have embodied a more practical perspective.

In 1887, the Court held that the Eleventh Amendment applied not only to suits naming the State as a party but also to suits brought "against its officers, agents, and representatives, where the State, though not named as such, is, nevertheless, the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates." *In re Ayers*, 123 U.S. 443, 506 (1887). And in 1921, to erase any lingering doubt that may have existed after *Ayers*, the Court held that the Eleventh Amendment applied to any "suit against a State" as judged by "the essential nature and effect of the proceeding, as it appears from the entire record. . . ." *Ex parte New York, No. 1*, 256

U.S. 490, 500 (1921). This common sense approach was again confirmed last term in *Idaho* v. *Coeur d'Alene Tribe of Idaho*, __U.S.__, 117 S.Ct. 2028, 2034 (1997) (adherence to "empty formalism" must be avoided; "real interests served by the Eleventh Amendment are not to be sacrificed to elementary mechanics of captions and pleading").

In *Ex parte New York, No. 2*, 256 U.S. 503, 509, 511 (1921), the Court ruled that the Eleventh Amendment applied to *in rem* admiralty actions. Although in that case the State of New York did have possession of the *Queen City*, its possession of the tug has not been deemed a critical factor in the Court's holding. This is demonstrated by the discussion of the case in *Welch* v. *Texas Highways & Public Transp. Dept.*, 483 U.S. 468, 473, 489 (1987) (plurality opinion), where the decision was characterized as a holding that the Eleventh Amendment bars *in rem* actions against a vessel owned by the State. *See also Florida Dept. of State* v. *Treasure Salvors, Inc.*, 458 U.S. 670, 707 (1982) (White, J., concurring and dissenting, joined by Rehnquist, O'Connor, and Powell, JJ.) ("The second *In re New York* decision, a sovereign immunity case, made clear that a State's immunity extended to admiralty actions *in rem*.")

The guiding principle of these Eleventh Amendment cases is that the test for determining whether a suit is in fact directed against the sovereign is the *effect* of the relief sought. *Pennhurst State School & Hosp.* v. *Halderman*, 465 U.S. 89, 107 (1984). The effect of the present action has been to enjoin the implementation of California's shipwreck management program, and it will result, ultimately, in the adjudication of the State's title to the *Brother Jonathan*. As demonstrated by *Coeur d'Alene, supra*, 117 S.Ct. 2028, these are precisely the type of impacts upon State sovereignty that the Eleventh Amendment protects against. There, the Tribe's suit for injunctive relief was characterized as the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.*, at 2040. Because the Eleventh Amendment would bar a quiet title action against Idaho in

federal court, it also barred the Tribe's sweeping request for injunctive relief, which would have caused "substantially all benefits of ownership and control [to] shift from the State to the Tribe." *Id.*

In light of these undoubted impacts upon State sovereignty, and the practical approach taken by this Court's cases, the answer to the immunity question here should not turn on whether the shipwreck is or is not in the State's actual possession. Indeed, a requirement of "actual possession," while it might have some utility or meaning in some other contexts, is absurdly out of place when talking of a shipwreck that has lain on the ocean floor for 130 years. States that have asserted title or regulatory authority over abandoned shipwrecks are said to have "constructive possession" of these wrecks.[5] But may the States be said to have "actual possession" of the some 5,000 shipwrecks that are estimated to lie on submerged lands throughout the country? If not, and if actual possession is indeed a requirement for assertion of sovereign immunity, then cases under the Abandoned Shipwreck Act will be routinely tried in the federal courts, something that was not contemplated by Congress when it enacted the ASA. The answer most consonant with this Court's Eleventh Amendment cases is that actual possession is not required as a precondition to assertion of a State's immunity.

A final point bears emphasis. Interpretation of the United States Constitution involves a unique jurisprudence that the tenets of admiralty law, however venerable, may not presume to affect, much less control. The point is particularly sharp

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5. *See Klein* v. *Unidentified, Wrecked and Abandoned Vessel*, 758 F.2d 1511, 1514 (11th Cir. 1985); *Jupiter Wreck, Inc.* v. *Unidentified Sailing Vessel*, 691 F.Supp. 1377, 1386 (S.D. Fla. 1988). Constructive possession is one of the alternative bases for assertion of the exception to the law of finds for abandoned property found on a landowner's property. *Id.* If indeed there were any requirement of "possession" for assertion of Eleventh Amendment immunity, constructive possession, already a recognized element of the law of finds, should be sufficient.

concerning the sovereign immunity of the States. In the language of this Court in *Principality of Monaco* v. *Mississippi*, 292 U.S. 313 (1934):

> "Behind the words of the constitutional provisions are postulates which limit and control. . . . There is . . . the postulate that States of the Union, still possessing attributes of sovereignty (footnote omitted), shall be immune from suits, without their consent, save where there has been 'a surrender of this immunity in the plan of the convention.' The Federalist, No. 81." *Id.*, at 322–23.

This special postulate, unique to the "plan of the convention," thus does not arise from within admiralty law. It does, however, necessarily govern the application of admiralty law when the interests of a State are involved, whether in an *in personam* or *in rem* proceeding.

In theory, this Court might choose to borrow from principles of admiralty law in its articulation of Eleventh Amendment jurisprudence. At this late date, however, that jurisprudence has evolved to a point that it is essentially free-standing, and too far along to be guided by admiralty principles that, although superficially related, have developed in a context significantly removed from the considerations that have informed constitutional doctrine.

II. THE STATE CLAIMS TITLE ONLY TO ABANDONED SHIPWRECKS, AND NO CONCLUSIVE PRESUMPTIONS PREVENT INTRODUCTION OF EVIDENCE CONCERNING ABANDONMENT

Whether under the ASA or section 6313 of the California Public Resources Code, California claims title only to abandoned shipwrecks. Subdivision (a) of section 6313 provides that:

> "The title to all *abandoned* shipwrecks and all archaeological sites and historic resources on or in the tide and submerged lands of California is vested in the state. All

abandoned shipwrecks and all submerged archaeological sites and submerged historic resources of the state shall be in the custody and subject to the control of the commission for the benefit of the people of the state of California. . . ." (Italics added.)

Potential for confusion arises, however, because subdivision (b) of section 6313 includes "any submerged . . . watercraft, or vessel and any associated cargo, armament, tackle, [or] fixture" within the definition of "submerged archaeological site" and "submerged historic resource." There is no express reference to these latter resources being abandoned in order to come with the State's title claim.

Subdivisions (a) and (b) must be read together, however. The word "abandoned" cannot simply be ignored. Accordingly, the most reasonable reading of the statute is that only abandoned shipwrecks are comprehended within the State's title claim. This is the interpretation placed on the statute by the State Lands Commission.

Further, California does not argue that any conclusive presumptions prevent introduction of evidence on the issue of abandonment. While it may be inferred, or "presumed" that a shipwreck has been abandoned, based upon the passage of time and the failure of the owner to salvage the wreck, contrary evidence may always be introduced to suggest that the wreck has not been abandoned.

Turning to what has been adjudicated below concerning abandonment, there has been only a threshold review of the issue, based on a very limited evidentiary presentation. The State's aim was merely to suggest, given Ninth Circuit law as expressed in *Marx* v. *Government of Guam*, 866 F.2d 294 (9th Cir. 1989), that it had a "colorable claim" to the *Brother Jonathan* and her cargo. J.A. 278–79. DSR, for its part, submitted only declarations, which in large part consisted of factual assertions that lacked proper foundation or were conclusory hearsay. J.A. 276, 123–75. A final factual adjudication concerning abandonment has yet to be made in this

case. Except to the extent that the factual representations below, as a matter of law, establish that abandonment has or has not occurred concerning the vessel or some portion of its cargo, abandonment remains an open question, to be resolved in further proceedings, whether in state or federal court.[6] What is important before this Court are the principles of law that will guide and govern that later factual adjudication.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Court reverse the decision of the Ninth Circuit Court of Appeals, vacate the Ninth Circuit's opinion, and direct the court of appeals to (a) vacate the district court opinion on denial of the State's motion to dismiss, (b) vacate the district court orders for arrest of the vessel and appointment of DSR as exclusive salvor, and (c) order dismissal of the State of California from the pending action.

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6. Concerning the cargo, all that may be said after the proceedings below is that DSR has submitted some evidence, by declaration, of its claim to an unidentified portion of the cargo. DSR asserts that this unidentified portion of the cargo is not abandoned. Concerning the vessel itself, no probative evidence was offered to counter the evidence concerning the long passage of time since its sinking and the failure of the owner to salvage it. As the United States notes in its brief, the abandonment of the vessel itself does appear to have been established by the submissions below. Brief for United States 45–46.

Respectfully submitted,

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